Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TYRONE THOMAS,
Petitioner,

v.

MARIE BAXTER
Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

TYRONE THOMAS
Pro Se
5516 Dawes Avenue
Alexandria, Virginia 22311
(703) 671-4455

QUESTION PRESENTED

Whether a conflict in the jurisdictions pertaining to the award of attorneys fees in civil cases against the losing litigant violates the due process rights of a losing litigant under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

The parties to the proceedings were petitioner, Tyrone Thomas, and respondent, Marie Baxter.

RULE 29.1 STATEMENT

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. _____

TYRONE THOMAS,
Petitioner,

v.

MARIE BAXTER
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Tyrone Thomas respectfully requests that a writ of certiorari be issued to review the judgments and opinions of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on May 5, 1997 and April 2, 1997.

OPINION BELOW

The Opinion of the Court of Appeals for the Fourth Circuit entered May 5, 1997 denying petitioner's petition for rehearing and suggestion for rehearing in banc is unpublished and is reprinted in

Appendix A. The unpublished per curiam opinion of the Court of Appeals for the Fourth Circuit decided April 2, 1997 is reprinted in Appendix B.

The memorandum opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division is reprinted in Appendix C and was rendered October 4, 1996. The order entered is reprinted in Appendix D.

The bankruptcy court order for the Eastern District of Virginia, Alexandria Division denying reconsideration of its imposition of sanctions is reprinted in Appendix E as entered May 7, 1996. The order imposing sanctions entered April 9, 1996 is reprinted in Appendix F.

JURISDICTION

Petitioner seeks review of the opinions and judgments issued by the Fourth Circuit Court of Appeals on May 5, 1997 and on April 2, 1997. The Supreme Court has jurisdiction to review these opinions pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV, to the Constitution of the United States in pertinent part: Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT V, to the Constitution of the United States in pertinent part: Nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, entered an Order on the docket July 21, 1995 requiring petitioner to answer interrogatories, produce documents, and to take a deposition. The Order is reprinted in Appendix G. The underlying order which preceded this proceeding was entered at a hearing August 5, 1993 which is reprinted in Appendix H. Respondent had filed to collect monies claimed from a divorce Agreement in DeKalb County, Georgia Superior Court. The Agreement is reprinted in Appendix I.

Petitioner was making efforts at the same time in 1995 to have the August 5, 1993 ruling declared void, set aside, or reversed in other filing in the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, However, the efforts were unsuccessful. It was not clear why petitioner's pleadings did not go forward. The other filings are not a part of this petition.

The order of contempt was entered at a hearing in which the petitioner did not make a personal appearance on April 9, 1996. The hearing was not reschedule. Petitioner had always made timely appearances at all other hearings or depositions. Petitioner had also filed timely pleadings, without the necessity of requesting extensions. The record is void of repeated requests by respondent for answers to interrogatories, for production of documents or for appearances at depositions. There are few if any facts set forth to support respondent's contention that petitioner failed to cooperate in the discovery process.

REASONS FOR GRANTING THE WRIT

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER OR NOT ATTORNEYS SHOULD BE AWARDED FEES TO BE PAID BY THE LOSING PARTY WHEN THAT

PARTY IS NOT HIS CLIENT

The landmark decision of *Alyeska Pipeline Service Co. v. Wilderness Society et al.*, 421 U.S. 240 (1974) upholds the American rule that each party in litigation pay its own attorneys fees. The idea of awarding attorneys fees to a party who acted as a private attorney general or crusader for a cause was rejected. The Wilderness Environmental Defense Fund was not allowed to block the construction of the trans-Alaska pipeline. The Court would not award fees based on its interpretation of public policy; but rather confined itself to statute. The requested fees were also not found to fall within one of the exceptions to the American rule, since there was not a finding of willful disobedience of a court order or bad faith.

In the First Circuit case of *Local 225, Service Employees International Union, AFL-CIO v. Nonotuck Resource Associates, Inc.*, 64 F3d 737 (1st Cir. 1995) the court cites the Alyeska principle but reaches its decision based on an exception to the American rule. The company that discharged two employees was found to have acted in bad faith, vexatiously, or for oppressive reasons. In another First Circuit decision it was held that fees to attorneys paid by the losing party should be awarded sparingly. Bad faith conduct must be described with "sufficient specificity accompanied by a detailed explanation of the reasons for justifying the award" *Whitney Bros. Co., et al. v. Sprafkin*, 60 F3d 13 (1st Cir. 1995). The district court did not explain the basis of the award, "particularly in light of the fact that no hearing was held on the issue." *Id.*, at 15.

The Second Circuit has determined that in civil contempt cases the conduct must be willful in order for the attorney to collect fees from the losing party for contempt. *King v. Allied Vision Ltd.*, 919 F. Supp. 752 (SDNY 1996). An author moved to hold a film distributor in contempt for using his name in connection with a film. The parties entered a consent decree in settlement of the case. The court held that the distributor had not willfully violated

the provisions of the consent decree and therefore the author was not entitled to an award of fees for his attorney. *Id.,* at 747. Proof of non compliance must be by clear and convincing evidence, rather than the lower standard of preponderance of evidence. There must be a clear and unambiguous order, evidence that the contemnor has not complied with the order, and evidence that the contemnor has not been reasonably "diligent" and "energetic" in attempting to comply with the order.[1] *Id.,* at 752.

An attorney may increase his fee above the maximum limit if it can be established that his services were especially extraordinary because of time and effort. *Mitzel v. Westinghouse Elec. Corp.,* 72 F3d 414 (3rd Cir. 1995). The Third Circuit upheld a contingency agreement and excepted it from the conflict of interest category. The case involved an attorney and his client, rather than a non client losing party. There was also no opposition on appeal.

The Fourth Circuit refers to conduct reaching the level of at least obstinance or recalcitrance before the willful disobedience exception relevant to the American rule is invoked. *Omega World Travel, Inc., v. Omega Travel, Inc.,* 710 F. Supp. 173 (E.D. VA 1989). The language has not been used in this case; but rather use of the word frivolous.

Similarly, the Fifth Circuit has dealt with the exception to the American rule for actions in bad faith or willful disobedience of a court order. In a case involving witness fee costs the district court has made no findings about the applicability of the bad faith exception. Consequently the claim could not be addressed on appeal. On remand the court was directed to make the

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[1]Andre Matenciot, Inc. v. David & Dash, Inc., 422 F. Supp. 1199 (SDNY 1976). (Contemnor willfully violated because he had the capacity to comply with the order, had not acted in good faith, and had not moved to vacate or modify the order prior to the alleged contumacious acts).

appropriate findings. *Albert, et al. v. Klevenhagen, et al.,* 896 F2d 927 (5th Cir. 1990).

The Sixth Circuit also holds that the prevailing party is generally not able to collect attorney's fees from the loser, *Wyser-Pratte v. Van Dorn Co.,* 49 F3d 213 (6th Cir. 1995). In order for a non litigant to collect from a common fund there must be a showing of bad faith, contempt, or other exceptional conduct. In common fund cases it is intended for the corporate entity to pay for the alleged behavior, rather than the individual. *Stampler v. Amalgamated Transit Union Local* 241, 27 F3d 316 (7th Cir. 1994).

In the Eighth Circuit willfulness is not necessarily a prerequisite, but rather a commonly held justification for awarding attorney's fees. *U.S. v. Dinwiddie,* 885 F. Supp. 1299 (W.D. Mo. 1995). Complainant presented evidence which was found to be credible, but the evidence of the contemnor was found to be unbelievable. The case involved a complaint to enjoin contemnor from violating the Freedom of Access to Clinic Entrance Act of 1994 and application for a temporary restraining order and other injunctive relief. The court found considerable evidence of willfulness. *Id.* at 1306. However, there was no award to the attorney when an insurance company refused to convert decedent's life insurance policy to a fix death benefit policy, from a policy that paid a larger amount and the decedent died before the change was made. After protest the companies made the change and paid at the higher rate. The evidence did not exceed the "willful and wanton disregard for the rights of another and does not rise to the level of oppression or connivance to harass or injure another." Therefore, there was not an award of fees to the attorney. *Chadima v. National Fidelity Life Inc. Co.,* 848 F. Supp. 1425 (S.D. Iowa 1994).

As in the Seventh Circuit, the Ninth Circuit also takes the position that the individual litigant should not pay fees of the winning attorney who he has not retained, *Ackley v. Western Conference of Teamsters,* 958 F2d 1463 (9th Cir. 1992). In this case union

members sued the union and lost. There was no evidence of bad faith or of willful disobedience of a court order. There was no statutory authority to shift fees. To rule otherwise would have a chilling effect on the right of union members to sue. *Id.* at 1479.

The Tenth Circuit has also held that the prevailing party should not shift costs to the loser. *Enchaster Satellite Corp. v. Advanced Communications,* 902 F. Supp. 213 (D. Colo. 1995). The victor requested that the cost of using videotapes to present evidence in a more persuasive manner than a transcript placed into the record by someone other than the witness be paid for by the loser. The court stated that there was a broader issue involved than whether the use of videotapes is a good litigation tool.

The attorney could collect fees in the Eleventh Circuit when the losing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons; or when the losing party was frivolous, unreasonable, groundless, harassing or delaying; or when the party confronted with a leg duty was so recalcitrant in performing that duty that the injured party was forced to resort to litigation. *U.S. v. Bachner,* 877 F. Supp. (S.D. Fla. 1995).

Finally, the District of Columbia Circuit has held that it is not necessary for there to be a finding of willful contempt for a court to award attorney's fees and cost. *Motley v. Yeldell,* 644 F. Supp. 557 (D. D.C. 1987). This case involved work done in connection with a contempt order in a class action suit involving violation of rights under the federal constitution and Social Security Act.

The various jurisdictions take different positions on the issue of willfulness and the award of fees to attorneys. There is a conflict as to whether fees should be awarded and under what circumstances.

Were the Due Process Rights of the Petitioner Violated?

To deviate from the usual method of procedure renders the judgement void. *Windsor v. McVeigh,* 93 U.S. 274 (1876). It gives the appearance of unfairness or of a double standard. In *McVeigh* judgment was entered without allowing the owner of real property to appear and defend his claim to the property. The property had been seized under an 1862 law which allowed for confiscation of property of rebels. The owner had been a supporter of the Confederacy in the Civil War. *Id.* at 274-276. No appearance was allowed and there could be no hearing or opportunity to be heard and therefore there could be no jurisdiction. By the act of the court the respondent was excluded from its jurisdiction *Id.,* at 284.

Amendment XIV and Amendment V of the United States Constitution provide that a person not be deprived of life, liberty, or property without due process of law. Rule 37 (a)(4)(A) of the Federal Rules of Civil Procedure sets forth circumstances under which a litigant need not pay expenses in sanctions proceedings. There was no specific inquiry as to what conduct was a violation of the discovery process. Petitioner was not present at the hearing at which sanctions were imposed. Petitioner also did not receive any notices requesting compliance with orders. Petitioner regularly responded to respondent's pleadings. In essence, in these proceedings there was not a real or genuine opportunity to be heard. In this civil case there was a taking without due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TYRONE THOMAS
Pro Se
5516 Dawes Avenue
Alexandria, Virginia
(703) 671-4455

Dated: August 1, 1997

APPENDICES

APPENDIX A

[Filed May 5, 1997]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-2470
CA-96-986-A
BK-90-10983-AB

TYRONE THOMAS

Debtor

MARIE BAXTER

Plaintiff-Appellee

v.

TYRONE THOMAS

Defendant - Appellant

On Petition for Rehearing *with Suggestion* for rehearing in banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX B

[Filed May 5, 1997]

UNPUBLISHED PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2470

In Re: TYRONE THOMAS

MARIE BAXTER, *Plaintiff-Appellee,*

versus

TYRONE THOMAS *Defendant - Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan, Jr., Senior District Judge. (CA-96-986-A, BK-90-10983-AB)

Submitted: March 27, 1997 Decided: April 2, 1997

Before RUSSELL LUTTIG, and MICHAEL, Circuit Judges,

Affirmed by unpublished per curiam opinion.

Tyrone Thomas, Appellant Pro Se. Neil David Goldman, YOUNG, GOLDMAN, & VAN BEEK, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals from the district court's order affirming the bankruptcy court's orders imposing monetary sanctions on Appellant for failure to comply with discovery orders and denying reconsideration. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *Baxter v. Thomas*, No. CA-96-986-A (E.D. Va. Oct. 7, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

MEMORANDUM OPINION IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TYRONE THOMAS	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-986-A
	)	
MARIE BAXTER	)	
	)	
Defendant.	)	

Memorandum Opinion

In this appeal from the United States Bankruptcy Court for the Eastern District of Virginia, the bankrupt appeals the imposition of sanctions totally $808.23 on April 9, 1996 and May 7, 1996. The sanctions were imposed for the bankrupt's failure to comply with discovery requests that had been propounded in a creditor's efforts to enforce an August 5, 1993 judgment obtained against the bankrupt. The August 5, 1993 judgment has been the subject of an appeal to this court, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. Although the judgment has been upheld, the bankrupt persists in attacking it as void, and the basis of his appeal is essentially on that ground. As other

As other grounds for appeal, the bankrupt argues that the sanctions were, in effect, criminal contempt sanctions, that he was denied due process, that the refusal to answer or respond was not willful, and the imposition of sanctions would be unjust. The court finds these arguments frivolous. Accordingly, the judgments will be affirmed, and the appeal will be dismissed.

United States District Judge

Alexandria, Virginia
October 4, 1996

APPENDIX D

ORDER IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

TYRONE THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-986-A
	)	
MARIE BAXTER,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the Memorandum Opinion this date filed, it is hereby ORDERED that:

(1) The April 9, 1996 and May 7, 1996 judgments of the United States Bankruptcy Court for the Eastern District of Virginia are affirmed;

(2) The appeals of the April 9, 1996 and May 7, 1996

orders of the United States Bankruptcy Court for the Eastern District of Virginia are dismissed.

United States District Judge

Alexandria, Virginia
October 4, 1996

APPENDIX E

ORDER ENTERED MAY 7, 1996 IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE:	
TYRONE THOMAS,	Case No. 90-10983 (Chapter 7)
Debtor,	
MARIE BAXTER,	
Plaintiff,	Adversary Proceeding No. 90-1183-AB
v.	
TYRONE THOMAS,	
Defendant.	

ORDER

UPON CONSIDERATION of the Defendant's Motion for Sanctions for Reconsideration of and to Set Aside the Court's Order Entered April 9, 1996 and Memorandum of Points and Authorities, the Plaintiff's Opposition thereto, and the oral arguments presented by the parties at hearing and it appearing to the Court that Defendant's Motion is frivolous and without merit,

and that good cause exists for the entry of relief sought by Plaintiff in its Opposition, it is hereby ORDERED:

(1) that the Defendant's Motion for Reconsideration of and to Set Aside the Court's Order Entered April 9, 1996, is DENIED:

(2) that the Defendant, Tyrone Thomas, comply with the Order of April 9, 1996, which is valid and continues in full force and effect;

(3) that the Defendant, Tyrone Thomas, pay to the Plaintiff's Counsel, within 30 days of the date of this Order, the additional sum of $312.50 for the attorney's fees associated with opposing the motion for reconsideration.

(4) that the Defendant, Tyrone Thomas, appear this day at 11:00 a.m. as ordered from the bench, at the offices of plaintiff's counsel for his deposition duces tecum and respond truthfully, accurately and completely to the questions asked of him by Plaintiff's Counsel; and

(5) that the Defendant, Tyrone Thomas, will be subject to further sanctions and to referral to the U.S. District Court for a finding of criminal contempt if he fails to obey any provisions of this Order

ENTERED this 7th day of May, 1996,

_____

Stephen S. Mitchell, Bankruptcy Judge

WE ASK FOR THIS:

YOUNG, GOLDMAN & VAN BEEK

By: _____
Neil D. Goldman, VSB No 18352

John Baker McClanahan, Jr., VSB No. 34284
510 King Street, Suite 416
P.O. Box 1946
Alexandria, Virginia 22313-1946
(703) 684-3260

Tyrone Thomas
Seen and Exception Noted

APPENDIX F

ORDER ENTERED APRIL 9, 1996 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE:	)	
	)	
TYRONE THOMAS,	)	Case No. 90-10983
	)	(Chapter 7)
Debtor,	)	
	)	
MARIE BAXTER,	)	
	)	
Plaintiff,	)	Adversary Proceeding
	)	No. 90-1183-AB
v.	)	
	)	
TYRONE THOMAS,	)	
	)	
Defendant.	)	

ORDER

UPON CONSIDERATION of the Plaintiff's Motion for Sanctions and Memorandum of Points and Authorities, and it appearing to the Court that Defendant, Tyrone Thomas, has failed, without justification, to comply with this Court's Order of July 18, 1995, and that good cause exists for the entry of the relief sought by Plaintiff, it is hereby ORDERED:

(1) that the Defendant, Tyrone Thomas, is guilty of civil

contempt of this Court;

(2) that the Defendant, Tyrone Thomas, pay to the Plaintiff's Counsel, with 30 days of the date of this Order, the sum of $245.73 for the court reporter's costs associated with the deposition of September 19, 1995;

(3) that the Defendant, Tyrone Thomas, pay to the Plaintiff's Counsel, within 30 days of the date of this order, the sum of $250.00 for the attorney's fees associated with the deposition of September 19, 1995;

(4) that the Defendant, Tyrone Thomas, produce the documents sought by the Plaintiff's Request for Production of Documents within 30 days of the date of this Order; and

(5) that the Defendant, Tyrone Thomas, appear at the offices of Plaintiff's Counsel for his deposition duces tecum on May 7, 1996, and respond truthfully, accurately and completely to the questions asked of him by Plaintiff's Counsel.

(6) that the Defendant, Tyrone Thomas, will be subject to further sanctions and to referral to the U.S. District Court for a finding of criminal contempt if he fails to obey any provision of this Order.

ENTERED this 9th day of April, 1996,

_____

Stephen S. Mitchell, Bankruptcy Judge

WE ASK FOR THIS:

YOUNG, GOLDMAN & VAN BEEK

By: _____

Neil D. Goldman, VSB No 18352

John Baker McClanahan, Jr., VSB No. 34284
510 King Street, Suite 416
P.O. Box 1946
Alexandria, Virginia 22313-1946
(703) 684-3260

APPENDIX G

ORDER DOCKETED JULY 21, 1995, IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE:	)	
	)	
TYRONE THOMAS,	)	Case No. 90-10983-AB
	)	(Chapter 7)
Debtor,	)	
	)	
MARIE BAXTER,	)	
	)	
Plaintiff,	)	Adversary Proceeding
	)	No. 90-1183-AB
v.	)	
	)	
TYRONE THOMAS,	)	
	)	
Defendant.	)	

ORDER

UPON CONSIDERATION of the Motion to Compel Discovery and Memorandum of Points and Authorities as filed by the Plaintiff, Marie Baxter, and it appearing to the Court that there is good cause for the entry of the requested relief, it is, on this _____ day of _____, 1995,

ORDERED, that the Defendant, Tyrone Thomas, serve fully responsive answers to the Plaintiff's Interrogatories and Request to Produce Documents on or before August 1, 1995; and it is further

ORDERED, that the Defendant, Tyrone Thomas, appear at the law office of Young, Goldman & Van Beek, 510 King Street, Suite 416, Alexandria, Virginia on Tuesday, September 19, 1995 at 10:00 a.m. for his Deposition Duces Tecum; and it is further

ORDERED, that the Defendant, Tyrone Thomas, pay to the Plaintiff the sum of $_____ for the expenses incurred, including attorneys fees, by the Plaintiff (1) as a result of the Defendant's failure to provide discovery and (2) in bringing this motion; and it is further

ORDERED, that should the Defendant, Tyrone Thomas, fail to fully and timely comply with this Order, the Court, in its discretion, may take such action as may be necessary to enforce this Order, including conducting contempt proceedings against the Defendant pursuant to Rule 9020 of the Federal Rules of Bankruptcy Procedure.

Judge Stephen S. Mitchell/s/

I ASK FOR THIS:

YOUNG, GOLDMAN & VAN BEEK

By: _____

Neil D. Goldman, VSB No 18352
510 King Street, Suite 416
P.O. Box 1946
Alexandria, Virginia 22313-1946
(703) 684-3260
Counsel for Plaintiff Marie Baxter

APPENDIX H

ORDER ENTERED ON THE DOCKET AUGUST 5, 1993
IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE:	
TYRONE THOMAS, *Debtor,*	Case No. 90-10983 (Chapter 7)
MARIE BAXTER, *Plaintiff,*	Adversary Proceeding No. 90-1183-AB
v.	
TYRONE THOMAS, *Defendant.*	

ORDER

This cause came to be heard on Plaintiff's Complaint objecting to dischargeability of debt. Following trial, the Court makes the following findings of fact, conclusions of law and judgment.

Findings of Fact

(1) Plaintiff Marie Baxter ("Wife") and Defendant Tyrone Thomas ("Husband") were married on August 28, 1976.

(2) The parties later separated on or about January 10, 1984, and were divorced by final judgment and decree entered August 6, 1984 in the DeKalb Superior Court in Georgia. The Decree specifically incorporated the Separation Agreement between the parties dated June 21, 1984 ("Agreement") which had been drafted by Husband's attorney.

(3) Paragraph 5 of the Agreement obligated Husband to "pay any back taxes or current taxes due, jointly or severally, by the parties prior to the effective date of this Agreement."

(4) The Husband failed to pay such back taxes, and as a result Wife made payments to the Internal Revenue Service of the sum of Five Thousand One Hundred Eighty-Two and 45/100 Dollars ($5,182.45) which payments were encompassed by paragraph 5 of the Agreement, and were the responsibility of Husband. The last of such payments was made on July 7, 1985.

(5) Assuming that the taxes had not been paid by Wife, such taxes would not have been dischargeable in this bankruptcy proceeding.

Conclusions of Law

As Wife made payments on husband's behalf of an obligation to the Internal Revenue Service which could not be discharged in this bankruptcy proceeding, the Court finds that Wife has the rights of the Internal Revenue Service relative to the amounts paid to satisfy husband's obligation, and as such, such debt is not dischargeable, and is owed by Husband to Wife.

Judgment

It is, therefore, by the Court this _____ day of _____, 1993,

ORDERED, that Husband's obligation to pay Wife the sum of Five Thousand One Hundred Eight-Two and 45/100 Dollars ($5,182.45), plus interest from July 7, 1985, is not dischargeable in the Husband's bankruptcy proceeding, and the Court hereby awards judgment to Plaintiff Marie Baxter and against Defendant Tyrone Thomas in the amount of Five Thousand One Hundred Eight-Two and 45/100 Dollars ($5,182.45), plus interest at the judgment rate from July 7, 1985, plus costs. The remaining claims in Plaintiff's Complaint are dismissed.

_____

Martin V. B. Bostetter, Jr.
Chief Judge

I ASK FOR THIS:

YOUNG, GOLDMAN & VAN BEEK

By: _____

Neil D. Goldman
510 King Street, Suite 416
P.O. Box 1946
Alexandria, Virginia 22313
(703) 684-3260

Attorney for Plaintiff

NOTICE OF JUDGMENT OR ORDER

Entered on Docket 8-5-93

APPENDIX I

AGREEMENT INCORPORATED INTO THE FINAL JUDGMENT AND DECREE OF DIVORCE

IN THE SUPERIOR COURT OF THE COUNTRY OF DEKALB STATE OF GEORGIA

TYRONE THOMAS,	)	CIVIL ACTION
	)	
Plaintiff,	)	FILE NO. 84-5041-6
	)	
VS.	)	
	)	
MARIE BAXTER,	)	
	)	
Defendant.	)	

AGREEMENT

Pursuant to the laws of this state, this agreement ("Agreement") is made and entered into by and between MARIE BAXTER THOMAS ("Wife") and TYRONE THOMAS ("Husband") on the date indicated below.

RECITALS

WHEREAS, the parties hereto have been legally married at Goshen, Pike County, Alabama on August 28, 1976, and there have been no children born of said marriage; and

WHEREAS, unfortunate differences have arisen between the parties making the continuation of their marital relationship impossible; and

WHEREAS, the parties desire to settle all matters between

them arising out of their marriage,

NOW THEREFORE, in consideration of these facts and circumstances and of the mutual promises made in this Agreement, Husband and Wife each agree:

1. Separation. The parties shall live separate and apart, and each shall go his or her own way without direction, control or molestation from the other, as if unmarried, and each shall not annoy or interfere with the other in any manner whatsoever.

2. Alimony. The provisions for Wife as set forth this Agreement are in full and complete satisfaction of any and all rights or claims of Wife for alimony. The provisions for Husband as set forth in this Agreement are in full and complete satisfaction of any and all rights or claims of Husband for alimony.

3. Debts. Each party agrees to assume and pay all outstanding debts individually incurred by him or her whether such debt was incurred before the marriage, during the marriage or during any period of separation, and each agrees to indemnify, defend and hold the other absolutely harmless from any expense, loss, claim or liability whatsoever arising from, or in any way connected with, such outstanding debts, except Wife shall pay the Sear account, VISA account and the mortgage to Advance Mortgage Corporation on the property located at 3566 Manhattan Drive, Decatur, DeKalb County, Georgia and hold Husband harmless thereon, and Husband shall make all payments on the second mortgage for the property located at 3566 Manhattan Drive, Decatur, Georgia to Citizens Trust Bank. Said payments shall be made as each installment becomes due and payable and Husband shall hold Wife harmless thereon. Further, the Wife shall be entitled to the VISA account for future use and the Husband shall have his name removed from said account.

4. Property Division. As part of an equitable division

of the property and debts of the parties, Husband shall pay to Defendant the sum of Two Thousand Dollars ($2,000.00) between April 1, 1984 and March 30, 1985; payable at the rate of at Five Hundred Dollars ($500.00) every four months.

5. Taxes. Husband shall pay any back taxes or current taxes due jointly or severally by the parties prior to the effective date of this Agreement.

6. Household Goods. All household goods, furniture, furnishings, appliances, fixtures, silverware, dishes and all other personal property located in the marital residence shall be and remain the sole and exclusive property of Wife.

7. Automobiles. Husband shall obtain or retain title and exclusive use of the 1972 Volkswagen Karmen Ghia, and shall become solely obligated for all payments due or which may become due for the use, operation, maintenance and financing thereof, and Husband shall hold Wife harmless thereon. Wife shall obtain or retain title and exclusive use of the 1983 Nissan Maxima, and shall become solely obligated for all payments due or which may become due for the use, operation, maintenance and financing thereof, and Wife shall hold Husband harmless thereon. The parties shall execute title transfer documents, if necessary, accordingly.

8. Bank Accounts - Not Jointly Held. The parties agree that any checking and saving account currently held by either party, excluding those held jointly by both parties, shall be the sole property of the party holding title thereto, free and clear from any claim of the other party.

9. Pension Waiver. After full disclosure of the nature and extent of any rights to future income under any pension plans, be they established either individually by a party or by a past or present employer for the benefit of a party (all of which are hereinafter referred to as "Plan"), each of the parties hereby releases and waives any claim he or she may have in any Plan titled in the

name, or held for the benefit, of the other party; and each party shall have full and absolute title to, or beneficial interest in, any such Plan now titled in his or her name, or held for his or her benefit, free from any claim of the other party now and forever.

10. Presentation to Court. This Agreement shall be presented to a court of competent jurisdiction in any action between the parties sounding in divorce with the request that it be adjudicated to be fair, just and proper and that it be adopted as a part of the order of said court in the final decree entered in said proceeding.

11. Effective Date. This Agreement shall be effective upon the execution of the Agreement by the parties.

12. Insurance Policies. Unless and except as otherwise provided herein, each of the parties agree that the other, after executive of this Agreement, shall have the right to make any changes in his or her respective insurance policies, including, but not limited to, changing his or her beneficiary, increasing or decreasing the coverage amount or canceling such policies.

13. Non-Use of Other's Credit. Neither Husband nor Wife may hereafter incur any debts or obligations upon the credit of the other, and each shall indemnify, defend and save the other absolutely harmless from any debt or obligation so charged or otherwise incurred.

14. Attorney Fees. Except as otherwise agreed, each party shall pay and be responsible for his or her respective attorney fees incurred after execution of this Agreement and in connection with this proceeding.

15. Division of Other Property. Except as set forth herein, the parties have effected to their mutual satisfaction a division of all other property, real or personal, in which they had

an interest, either singly or jointly; all such property which Husband or Wife now has in his or her control and possession shall be and remain his or her property respectively, free from any claim whatsoever on the part of the other.

16. Modification of This Agreement. This Agreement may not be altered, changed, or modified except in writing signed by each of the parties. After approval of this Agreement and entry of a Final Judgment and Decree of Divorce, this Agreement may not be altered, changed or modified except pursuant to the Court's approval and order of modification.

17. Advice of Counsel. Each party acknowledges that they had an opportunity to seek the advice of legal counsel and that they are entering into this Agreement voluntarily of their own free will.

18. Law Applicability. The provisions of this Agreement shall be construed and enforced in accordance with the applicable laws of the State of Georgia.

19. Enforcement Expenses. If either Husband or Wife defaults in the performance of any of the terms, provisions or obligations herein set forth, and it becomes necessary to institute legal proceedings to effectuate the performance of any provisions of this Agreement, then the party found to be in default shall pay all expenses, including reasonable attorney fees, incurred in connection with such enforcement proceedings.

20. Full Understanding. Each party fully understands all of the terms of this Agreement, and the terms represent and constitute the entire understanding between them. Each party has read this Agreement and finds it to be in accordance with his or her understanding, and each voluntarily executes this Agreement and affirms his or her signature in the presence of the witnesses indicated below.

21. Performance of Necessary Acts. Each party shall execute any and all deeds, bills of sale, endorsements, forms, conveyances or other documents, and perform any act which may be required or necessary to carry out and effectuate any and all of the purposes and provisions herein set forth. Upon the failure of either party to execute and deliver any such deed, bill of sale, endorsement, form, conveyance or other document to the other party, this Agreement shall constitute and operate as such properly executed document. The County Auditor, County Recorder and any and all other public and private officials are authorized and directed to accept this Agreement or a properly certified copy hereof in lieu of the document regularly required for the conveyance or transfer.

22. Representations of Financial Status. Each party has made a true and direct representation of his or her financial status, including possible expectancies and inheritances.

23. Release. Each party does hereby release and discharge the other from all other claims, rights and duties arising out of said marital relationship, and said parties mutually agree that each party hereto may freely sell and encumber or otherwise dispose of his or her own property by gift, bill of sale or Last Will and Testament. Each party is by these presents hereby barred from and all rights or claims by way of dower, inheritance, descent and distribution, allowance of year's support, right to remain in the mansion house, all rights and claims as widow, widower, heir, distributee, survivor or next of kin and all other rights or claims whatsoever in or to the estate of the other, whether real or personal, or whether now owned or hereafter acquired which may in any manner arise or occur by virtue of said marriage.

24. Binding of Heirs. All the covenants, promises stipulations, agreements and provisions herein contained shall bind the heirs, executors, administrators, personal representatives and assigns of the parties hereto.

25. Severability and Enforceability. If any provision of this Agreement is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

IN WITNESS WHEREOF, the parties have affixed their signatures hereto on the dates indicated.

_____ _____

MARIE BAXTER THOMAS

_____

June 11, 1984
Date

Sworn to and subscribed in my presence this 11 th day of June, 1984.

_____

Notary Public

WITNESSES to Husband's Signature

_____ _____

TYRONE THOMAS

_____

June 21, 1984
Date

Sworn to and subscribed in my presence this 11 th day of June, 1984.

_____

Notary Public